Filed 9/26/14 P. v. Taylor CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROSEAN DAMONT TAYLOR,<br><br>Defendant and Appellant. | B245455<br><br>(Los Angeles County Super. Ct. No. YA081703) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Winston Kevin McKesson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Rosean Damont Taylor on one count of assault by means likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)[1] Appellant, who is African American, objected to the racial makeup of the jury panel and moved to compel discovery of evidence that he asserted was necessary to establish a violation of his constitutional right to a jury drawn from a fair cross-section of the community. The trial court denied his motion, and he now appeals. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND[2]

Appellant was charged in an amended information with one count of assault by means likely to produce great bodily injury. (§ 245, subd. (a)(1).) The information further alleged that appellant had suffered two prior strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior serious felony or violent felony convictions (§ 1170, subd. (h)(3)). Appellant pleaded not guilty and denied the allegations.

Trial began in the Southwest District of the Los Angeles Superior Court. During voir dire, appellant's attorney, Winston McKesson, objected to the jury panel.[3] He stated, "As I told the court earlier, I am engaged in litigation downtown

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] We do not set forth the underlying facts of the offense, which are not pertinent to this appeal.

[3] "'The jury "pool" is the master list of eligible jurors compiled for the year or shorter period from which persons will be summoned during the relevant period for possible jury service. A "venire" is the group of prospective jurors summoned from that list and made available, after excuses and deferrals have been granted, for assignment to a "panel." A "panel" is the group of jurors from that venire assigned to a court and from which a jury will be selected to try a particular case.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1193, fn. 2 (*Jackson*).)

in criminal courts building with respect to the way African-Americans are [dispersed] throughout the county. [¶] I would like to state for the record while there is one person I'm partially unsure of, in the panel of 35 [there] appears to be no African-Americans. There's a lady in the back who in my opinion is Samoan or from a Pacific Island. I don't think she's African-American, but she could be." The trial court responded, "the person looks African-American to me. But we can make an inquiry." McKesson continued, "Yes. I would just like to know, we have the latest records from the census. According to the census – this is in the Southwest District – the population for the Southwest District is 742,558. Of that, 15 percent of the Southwest District are African-American. I would like to point out that also 15.5 percent [are] Asian. So it's roughly the same amount. [¶] I have counted four to five Asians in the panel and no African-Americans. [¶] So I would like the record to be clear that I am objecting to this panel on racial grounds."

The trial court asked, "What is the legal authority that stands for the proposition that you're entitled to say in this case that 15 percent African-Americans [are required to be] in the panel?" McKesson argued that "the United States Constitution entitles [appellant to an] appropriate cross-section of the community where the courthouse sits. [¶] The California Supreme Court has held community is defined as the judicial district." He explained that there was a federal case in Orange County that found a presumptive violation where the judicial district was 31 percent Latino, and "the representation in the panel was about five or six points off. . . . [¶] Here we're dealing with . . . 15 points off. [¶] An[d] especially with comparative analysis, when you compare it to the Asian population, which is virtually the same, our figure shows 15.5 percent Asian and

15 percent African-American. And I see no African-Americans on the panel. [¶] So what we have to do, we have to make a presumptive showing. After that, then we are entitled to discovery from the jury commissioner because the jury commissioner keeps records and statistics and all this, and we can find out how the jury is being [dispersed]."

The trial court stated, "I would agree that it appears that no more than one person is African-American. But I know of no authority, no California statute or case authority, that allows for or requires me to dismiss this panel and bring up another one." The court accordingly denied appellant's motion and declined to accept defense counsel's written motion.

On June 5, 2012, twelve additional prospective jurors were ordered to the courtroom. Appellant renewed his objection to the panel, but the court overruled the objection.

The jury found appellant guilty of one count of assault. (§ 245, subd. (a)(1).) Appellant filed a motion for new trial based on newly discovered evidence, attaching a declaration from the victim, who did not testify at trial and averred in the declaration that appellant did not assault her. The trial court denied the motion.

Appellant renewed his objection to the jury panel. McKesson again stated that there were no African-Americans in the panel in a district that is 15 percent African-American. He argued that he was entitled to discovery from the jury commissioner to determine how jurors are dispersed in the district. McKesson expressed the belief that the jury commissioner sent African-Americans to a court in Inglewood, where they try misdemeanor cases, while "jurors at the south end of the district [are sent] to Torrance to hear the more serious cases."

The trial court denied appellant's motion, stating that there was no evidence that appellant's contentions were true. The court further reasoned, "I don't know what the ethnic makeup was of each of the jurors. . . . it could very well be that a juror could appear to be Caucasian but have African-American blood in them." The court sentenced appellant to a term of six years.

## DISCUSSION

Appellant challenges the trial court's denial of his motion to compel discovery. "The standard of review for a ruling on a motion to compel discovery is abuse of discretion. [Citation.]" (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1775.) We find no abuse of discretion and therefore affirm.

"Under the federal and state Constitutions, an accused is entitled to a jury drawn from a representative cross-section of the community. [Citations.] That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. [Citation.] 'In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.' [Citations.] The relevant 'community' for cross-section purposes is the judicial district in which the case is tried. [Citations.] If a defendant establishes a prima facie case of systematic underrepresentation, the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in

the disparity in the jury venire. [Citation.]" (*People v. Horton* (1995) 11 Cal.4th 1068, 1087-1088.)

In this case, however, we are not considering "whether [appellant] has made a prima facie case, but the prior question of whether [appellant] was wrongly denied the discovery of information necessary to make such a case. A defendant who seeks access to this information is obviously not required to justify that request by making a prima facie case of underrepresentation." (*Jackson*, *supra*, 13 Cal.4th at p. 1194.)

*Jackson* relied on the "reasonable belief" standard used for motions under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to define the standard a defendant must meet when seeking discovery of information necessary to make a case of underrepresentation. The court held that, "upon a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion, the court must make a reasonable effort to accommodate the defendant's relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent. [Citation.]" (*Jackson*, *supra*, 13 Cal.4th at p. 1194, citing *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 93.) "'[A] "reasonable belief" is simply a "conviction of mind . . . *arising by way of inference*" [citation], a "belief begotten *by attendant circumstances, fairly creating it, and honestly entertained*." [Citation.]' [Citation.]" (*Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115, 1135.)

"Contrary to appellant's contention in this case, a defendant does not establish the underrepresentation requirement by showing a disparity on the particular jury panel assigned to the court in which his or her jury is to be selected.

Underrepresentation on the defendant's particular panel is not relevant. [Citation.]"[4] (*People v. De Rosans* (1994) 27 Cal.App.4th 611, 618 (*De Rosans*).)

The circumstances here are similar to those found in *De Rosans*, in which the defendant first challenged the jury panel during voir dire. The defendant in *De Rosans* did not move to compel discovery, but instead moved for a continuance in order to prepare a challenge to the jury panel pursuant to Code of Civil Procedure section 225. The trial court denied the motion, and the appellate court affirmed. (*De Rosans*, *supra*, 27 Cal.App.4th at p. 622.) The court in *De Rosans* observed that, although a challenge to a jury panel is timely if made before the jury is sworn (Code Civ. Proc., § 225), "a challenge on fair cross-section grounds usually is made as a pretrial motion before any panel is assigned to the court that will try the defendant." (*Id.* at p. 620.)

*De Rosans* explained that the fair cross-section requirement did not mean that the defendant was entitled to a panel that represents a cross-section of the community. "Rather, he is entitled to a panel *drawn from* a representative cross-section of the community. Thus, a challenge to the jury panel is always necessarily a challenge not to the composition of the panel but to the procedure by which the panel is composed." (*De Rosans*, *supra*, 27 Cal.App.4th at p. 621.) Because a challenge under Code of Civil Procedure section 225, like a fair cross-section challenge, is "based on information that in most cases is available well before the panel appears for voir dire," the court concluded that "[t]he trial court did not

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[4] The representative cross-section requirement arises in the context of a specific jury panel when a defendant makes a *Batson*/*Wheeler* motion challenging the prosecutor's use of peremptory challenges to preclude potential jurors from serving. (*People v. Currie* (2001) 87 Cal.App.4th 225, 232; *People v. Reynoso* (2003) 31 Cal.4th 903, 907-908.) This case, however, does not involve the exercise of peremptory challenges.

abuse its discretion in denying [the defendant's] motion for a continuance to make such a challenge once the trial had commenced." (*Id.* at pp. 621-622.)

Similar to *De Rosans*, appellant here improperly attempted to challenge his specific jury panel during voir dire, rather than filing a pretrial motion to compel discovery regarding the practices of the jury commissioner in dispersing the entire jury venire. The original information was filed in August 2011. Appellant did not move to compel discovery regarding the jury selection process until voir dire began on May 30, 2012. Even had appellant's challenge to the specific jury panel rather than the jury venire been proper, his belated request for discovery would have delayed the trial and required a continuance. The trial court did not abuse its discretion in denying his motion to compel discovery. (See *De Rosans*, *supra*, 27 Cal.App.4th at p. 622.)

**DISPOSITION**

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J. COLLINS, J.